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No. 82-1577

# In the Supreme Court of the United States

**October Term, 1982**

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

*Appellants,*

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC. ("MACMA")

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## MOTION TO DISMISS

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*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## MOTION TO DISMISS

Defendant-Appellee Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA")[1] moves, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed on the ground that the question on which the decision of the cause depends is so unsubstantial as not to require further argument.

1. MACMA was organized as a Michigan cooperative corporation for purposes of providing agricultural commodity marketing services for its farmer members. It is affiliated with the Michigan Farm Bureau, a non-profit corporation which owns a majority of the voting (common) stock of MACMA.

## OPINION BELOW

The final opinion of the Michigan Supreme Court, dated December 23, 1982, is set forth in the appendix of Appellants' Jurisdictional Statement.

## JURISDICTION

The jurisdictional requisites are set forth in Appellants' Jurisdictional Statement.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are set forth in Appellants' Jurisdictional Statement.

## COUNTER-STATEMENT OF THE CASE

After concluding that the marketing and bargaining position of individual farmers would be adversely affected unless their right to join together was afforded greater protection, Congress passed the Agricultural Fair Practices Act of 1967, 7 U.S.C. §2301 *et seq.* That Act strengthened the rights of individual farmers to join together for their mutual benefit by providing legal sanctions against handlers who might discriminate against farmers because of their membership in producer associations.

In 1972 the Michigan Legislature passed the Agricultural Marketing and Bargaining Act, 1972 P.A. 344, Mich. Comp. Laws §290.701 *et seq.* The Michigan Act shares the Federal Act's purpose of permitting individual

farmers to improve their marketing and bargaining position by bargaining collectively with handlers. The Michigan Act provides a procedure by which an association which represents a majority of farmers producing a majority of an agricultural commodity may become accredited as the exclusive bargaining representative, in negotiations with handlers, of all farmers who produce a certain commercial quantity of the commodity. In permitting a majority of affected farmers to choose this exclusive representation system the Michigan Legislature regulated in an area that had been previously left unregulated by Congress in its passage of the Federal Act.

The Michigan Act is not preempted because it does not conflict with the Federal Act.

## ARGUMENT

### The Case Presents No Substantial Question

After acknowledging that (1) the Michigan Act ("AMABA") and the Federal Act ("FAFPA") share a common general purpose, i.e., to protect a farmer's right to join a cooperative association and to bargain collectively with processors through that association, and that (2) the FAFPA left some latitude for regulation by the states, Appellants have asserted that the AMABA is preempted because of an "apparent conflict" (Jurisdictional Statement at 9) between it and the FAFPA. The Michigan Supreme Court unanimously rejected Appellants' contentions that (1) AMABA stands as an obstacle to the accomplishment of the full purposes and objectives of Congress as expressed in FAFPA and that (2) the simultaneous compliance with both statutes was impossible. Because of the rule against seeking out conflicts between state

and federal regulations where none *clearly* exists (*Huron Portland Cement Co.* v *Detroit*, 362 U.S. 440, 446 (1960)), it is apparent that the question raised by Appellants is so unsubstantial as not to warrant plenary consideration by this Court.

In an effort to circumvent the holdings of this Court requiring a clear manifestation of intention by Congress to preempt state law, as must be evidenced by an unambiguous *actual* conflict between federal and state statutes, Appellants argue that Congress in FAFPA struck a "balance" by protecting conflicting interests of farmers and handlers (11, 24). Appellants then complain that AMABA upsets this purported "balance" and that the Michigan Supreme Court erroneously failed to identify such balance after all the legislative history and individual provisions of FAFPA were carefully reviewed by it. To support their balance theory, and the alleged error of the Michigan Supreme Court in failing to recognize it, Appellants set forth three arguments.

Appellants' first argument is that FAFPA protects a farmer's right *not* to join a cooperative association and that the AMABA "destroys this right" (12). In considering this argument it is important to keep in mind the following congressional findings and declaration of policy, expressed in the FAFPA itself, which demonstrate that notwithstanding a farmer's admitted right to refrain from formally joining an association, the primary purpose of FAFPA was to strengthen farmers' rights to bargain collectively with processors:

> "Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by

law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce." 7 U.S.C. §2301.

The Michigan Supreme Court did not hold, as Appellants now say, that §2303 of FAFPA "created no right to refrain from joining the association" (26). This argument misconstrues the Michigan Supreme Court's correct observation that §2303 "protects a producer from being unduly influenced *by a handler* in deciding whether or not to join a cooperative marketing association". Jurisdictional Statement, A10 (emphasis in original). Indeed, there can be no conflict between FAFPA and AMABA on the issue of a farmer's right *not to join* a cooperative association because AMABA also explicitly protects this right. Mich. Comp. Laws 290.704.

In an attempt to support their argument that the exclusive representation provisions of AMABA destroy a farmer's right not to join a cooperative association, Appellants refer to the AMABA system as a "closed union shop" (11). This argument not only ignores the distinction between an agency shop and a union shop but, more significantly, ignores the critical fact that a bargaining unit member, who is bound by the bargaining of his exclusive bargaining representative and who is required to financially support this representative with a service fee, is not being unlawfully coerced, as contemplated and prohibited by FAFPA and AMABA, into joining a cooperative association.

While Appellants state that the Michigan Supreme Court improperly equated the terms "handler" and "processor" (16), the footnote from the Michigan Supreme Court Opinion which Appellants cite reveals that said

Court was aware of the technical difference between the two terms. We submit that the Supreme Court merely pointed out that such difference was not pertinent to its ruling because that Court knew that the AMABA, like FAFPA, *expressly* protected a farmer's right to refrain from joining, as well as the right to join, a cooperative association.

Appellants' second argument is that the AMABA "completely eliminates the rights of individual farmers and purchasers to deal directly with one another" (11). Appellants have argued that Congress affirmatively created a federal right in a statutory provision that expressly stated what the Congress was *not* doing. The Michigan Supreme Court found no ambiguity in this disclaimer provision of FAFPA, §2304, and correctly observed (A8) that:

> "The language of §2304 does not justify the meaning plaintiffs assign to it. The disclaimer provision, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase '[n]othing in this chapter', referring to the substantive and affirmative provisions of FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a 'disclaimer of intention' a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'. Section 2304 is nothing more than an explanation of what FAFPA was not intended to do. It did not, in disclaiming any 'Intention to prohibit normal dealing', thereby create or affirmatively protect an individual

handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer neutral on *that* point."

While the Michigan Supreme Court was correct in noting that "Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations" (A8), Appellants ignore the fact that the Michigan Supreme Court recognized that, even with the adoption of the AMABA, producers in the bargaining unit (regardless of how they exercise their concurrent federal and state statutory right to join or not join the association) may indeed deal separately and individually with processors so long as such dealings are not inconsistent with the terms of the contract negotiated between the association and the processor (A6).

Appellants' final argument is that it is impossible to simultaneously comply with both the AMABA and the FAFPA, and that compliance with the former would trigger federal enforcement of the latter. Appellants have failed to cite any case in which a court held that compliance with AMABA, or action permissible thereunder, triggered federal enforcement of FAFPA. In contrast, the state trial court observed that "Witness Torgerson, a USDA official, indicated that compliance with AMABA would not 'trigger' federal enforcement of AFPA" (A74). Likewise, the Michigan Supreme Court found that nothing in either of the two federal district court cases cited by Appellants "can be fairly read to suggest that the *state* requirement of exclusive association representation of all unit members makes it physically impossible to comply with both acts" (A17). In both the unreported *Garrison* v *Dairymen* case and in *Butz* v *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974), the Courts' decisions were directed toward pre-

venting a *processor's* coercion of a farmer's right to join, or refrain from joining, a cooperative association. In *Butz* the Court noted that:

> "The overriding purpose of Congress in enacting the Agricultural Fair Practices Act of 1967 was to protect the individual producer of milk in his right to band together with other producers or, in effect, to unionize." 386 F. Supp. at 235.

To argue, in the face of that judicial statement of FAFPA's purpose, that a state cannot provide an association with tools typically available to unions without automatically violating FAFPA, is to ignore the ample legislative history discussed by the Michigan Supreme Court. The U.S. Court of Appeals for the Second Circuit recognized the consistent congressional policy to help farmers strengthen their ability to negotiate with processors in *Fairdale Farms* v *Yankee Milk, Inc.*, 635 F.2d 1037, 1042 (2d Cir., 1980), wherein that Court noted that:

> "As late as 1968, with the enactment of the Agricultural Fair Practices Act [citations omitted], Congress continued to recognize the need for stronger and more effective bargaining and marketing associations for farmers."

Also see, *National Broiler Marketing Assoc.* v *United States*, 436 U.S. 816, 837 (1978) (Concurrence of Brennan, J.).

While Appellants are inaccurate in their statement that the Michigan Supreme Court characterized Section 2304 of FAFPA as "meaningless surplusage", that Court was correctly unwilling to conclude that such section undercut the primary purpose of the Act. In support of its reading of FAFPA, which does not prevent collective bargaining by farmers but rather encourages same, the

Michigan Supreme Court expressly relied (A11) on the Report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending passage of FAFPA, which stated in pertinent part:

> "It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargaining with processors and other buyers over the terms of sale of the producers' farm products. Cooperative bargaining has come into prominence as the old market system is being displaced by contractual arrangements in the production and marketing of agricultural products. We believe these trends will continue.
>
> The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impediments confronting producers in organizing and operating their cooperative associations." 1968 U.S. Code Cong. & Ad. News, p. 1875.

For the foregoing reasons it is clear that the AMABA is not preempted by the FAFPA.

## CONCLUSION

WHEREFORE, Appellee MACMA respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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